

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 VERNON WAYNE MCNEAL,
12 Plaintiff,
13 v.
14 EVERT, et al.,
15 Defendants.
16

No. 2:05-cv-0441-GEB-EFB

**ORDER GRANTING DEFENDANTS'
MOTION TO MODIFY THE PRETRIAL
ORDER**

17 On February 8, 2017, Defendants filed a motion to
18 modify the portion of the Pretrial Order filed on February 24,
19 2015, concerning the expert witnesses listed therein. Defs.'
20 Mot. ("Mot."), ECF No. 281. The Pretrial Order lists the
21 following expert witnesses: Correctional Captain R. Plainer
22 ("Plainer") (regarding use of force policies and procedures . .
23 ."), and Chief Medical Executive Dr. D. Swingle **"or her designee**
24 **(regarding plaintiff's injuries and their cause)."** ("Dr.
25 Swingle"). Pretrial Order ("PO") (Emphasis added), 15:24-27, ECF
26 No. 180. Defendants argue as follows that changed circumstances
27 justify the modification they seek:

28 Since [the date the Pretrial Order issued],

1 the trial date in this case has been set and
2 re-set on five occasions, and Dr. Swingle has
3 retired from [the California Department of
4 Corrections and Rehabilitation ("CDCR")],
5 precluding her from participating in the
6 trial currently scheduled to begin on October
7 24, 2017. Defendants request to change . . .
8 Plainer's designation from non-retained to a
9 retained expert as he has also retired from
10 CDCR. Defendants therefore request the Court
11 to allow them to call Galen H. Church, D.O.
12 [("Dr. Church")], an employee of [CDCR] as
13 the Chief Physician and Surgeon at the
14 Correctional Health Care Facility in
15 Stockton, California, as a medical expert,
16 who will render substantially the same
17 opinions as Dr. Swingle. Defendants also
18 request the Court change . . . Plainer's
19 designation from non-retained to retained
20 expert.

21 Mot. 1:28-2:8, ECF No. 281. Defendants' counsel declares "that
22 following [Dr. Swingle's] retirement, attempts had been made to
23 contact her and she was not responding." Plaintiff opposes
24 Defendants' motion. Pl.'s Opp'n ("Opp'n"), ECF No. 282.

25 **LEGAL STANDARD**

26 Rule 16(e) of the Federal Rules of Civil Procedure
27 prescribes that a final pretrial order may be modified "only to
28 prevent manifest injustice." Fed. R. Civ. P. 16(e). Four non-
exclusive factors are considered when determining whether a
modification is justified under the manifest injustice standard:

(1) the degree of prejudice to [Defendants]
from a failure to modify; (2) the degree of
prejudice to [P]laintiff from a modification;
(3) the impact of a modification at [this]
stage of the litigation on the orderly and
efficient conduct of the case; and (4) the
degree of willfulness, bad faith, or
inexcusable neglect on the part of
[Defendants].

29 United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887
30 (9th Cir. 1981). The movants for modification have "the burden

1 of showing that an amendment to the pretrial order [is] necessary
2 to prevent 'manifest injustice.'" Galdamez v. Potter, 415 F.3d
3 1015, 1020 (9th Cir. 2005).

4 DISCUSSION

5 A. Dr. Swingle

6 Defendants contend they "will be greatly prejudiced in
7 the event they are not permitted to substitute [a medical expert
8 named] Dr. Galen Church for Dr. Swingle." Defs.' Reply ("Reply")
9 2:13-14, ECF No. 283. However, the manifest injustice standard
10 has not been shown applicable to this requested modification
11 since the PTO authorizes an expert "designee [change] regarding
12 plaintiff's injuries and their cause" and "a pretrial order
13 should . . . be liberally construed to permit evidence . . . at
14 trial that can fairly be said to be embraced within its
15 language." First Nat'l Bank of Circle, 652 F.2d at 886.
16 Therefore, this modification is granted.

17 B. Plainer

18 Defendants also seek to change "Plainer's [expert
19 witness] designation [in the Pretrial Order] from non-retained to
20 retained expert." Reply 1:24, ECF No. 283. The Pretrial Order
21 identifies Plainer only as "Expert Witness Correctional Captain
22 R. Plainer (regarding use of force policies and procedures at
23 [High Desert State Prison])." PO 15:24-25, ECF No. 180.

24 However, Defendants specific designation of Plainer as
25 a retained expert in their motion triggers additional disclosure
26 obligations under Rule 26(a)(2)(B) of the Federal Rules of Civil
27 Procedure. This rule prescribes in pertinent part that in
28 addition to providing Plainer's identity, Defendants' retained

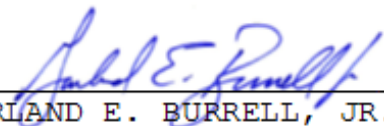
1 expert witness "disclosure [for Plainer] must be accompanied by a
2 written report – prepared and signed by the witness." Defendants
3 include in their motion a declaration that "[a] copy of Mr.
4 Plainer's report was served on Plaintiff on February 8, 2017,
5 Anderson Decl. ¶ 6, ECF No. 281, and Defendants state in their
6 motion that they have "offer[ed] to make . . . Plainer available
7 for deposition[] prior to trial." Mot. 3:25-26, ECF No. 281.
8 Since Defendants have shown their necessity for changing
9 Plainer's expert status from non-retained to retained, and have
10 made the required additional disclosure obligations under Rule
11 26(a)(2)(B) of the Federal Rules of Civil Procedure, the Pretrial
12 Order is modified as Defendants request and Plainer is therefore
13 Defendants' retained expert witness.

14 **CONCLUSION**

15 For the foregoing reasons, Defendants' Motion to Modify
16 the Pretrial Order is GRANTED.

17 IT IS SO ORDERED.

18 Dated: April 21, 2017

19
20 
21 _____
22 GARIAND E. BURRELL, JR.
23 Senior United States District Judge
24
25
26
27
28